CHAPTER 7

SCOPE OF REVIEW OF MILITARY ADMINISTRATIVE DETERMINATIONS

7.1 Introduction.

a. Meaning of "Scope of Review." What is meant by the "scope of review" of military activities is not easily defined. It includes elements of the question of reviewability as well as issues concerning methods of review. In essence, however, "scope of review" involves the determination of what issues the federal courts will examine in cases properly before them and to what extent federal judges will substitute their judgment for that of the military officials or bodies whose decisions are being reviewed. The law concerning the scope of review of courts-martial has developed quite independently of the law concerning the scope of review of other military activities. For this reason, this chapter will treat it separately. It will deal with the scope of review of military administrative determinations. Chapter 8 will examine federal judicial review of courts-martial.

b. "Scope of Review" Dependent on Nature of Challenged Administrative Determination. Generalizations about the scope of review of military administrative determinations are difficult. One problem is that they range in character from the very informal (such as barring an individual from an installation) to the very formal (such as hearings before the Army Board for Correction of Military Records). Another problem is that the scope of review of administrative determinations is unclear.[1] Perhaps the only

[1] See generally 5 K. Davis, Administrative Law Treatise § 29.1 (1984).

definitive statement that can be made is that scope of review depends on the nature of the determination being reviewed.

c. Types of Military Administrative Determinations. Generally, military administrative matters can be grouped into five areas in discussing the various standards of review used by the federal courts: enlistment contracts, conscientious objector determinations, violations of statutes and regulations, constitutional violations, and disputed discretionary decisions.

7.2 **Enlistment Contracts.**

a. General Rule. Claims that enlistment contracts are invalid or have been breached are decided under traditional principles of contract law. The leading case is Peavy v. Warner:

PEAVY v. WARNER

493 F.2d 748 (5th Cir. 1974)

> Peavy appeals from the district court's denial of his writ of habeas corpus in which he sought cancellation of his two year enlistment extension in the Navy. Concluding that the court below applied the wrong standard of review and seemingly failed to make findings as to the most important aspect of Peavy's claim, we reverse and remand for further proceedings.
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> On October 20, 1969, Peavy joined the Navy. On November 6, 1969, in exchange for advanced training in a technical field, Peavy agreed to extend his original four year enlistment for two additional years. The relevant clause of Peavy's extension agreement provided:

> I understand that this Extension Agreement becomes binding upon successful completion of basic training (Phase I) and upon enrollment in advanced training (Phase II) and thereafter may not be cancelled except. . . . (emphasis added)

Peavy testified that after the Navy assigned him to a type of advanced training other than his first choice but before enrollment in the training program he attempted to secure information from various sources including Navy personnel officers on the manner in which to cancel the extension agreement. Peavy stated that the sources answered uniformly--impossible. The Navy now concedes that the contract did provide for cancellation prior to enrollment in advanced training.

Immediately before enrollment in advanced training Peavy executed an "automatic advanced agreement" that purported to make the extension agreement binding. Peavy contended that he executed the advanced agreement and accepted the concomitant promotion to E-4 because he was faced with no other choice. Both a Naval personnel officer and a Naval legal officer advised him at that time that he could not cancel the extension, thus the automatic advancement agreement was immaterial.

Later in his tour of duty, Peavy submitted formal requests for cancellation to the Chief of Naval Personnel and to the Board of Correction of Naval Records. Naval Personnel denied the cancellation saying that Peavy had received the training and personnel were not normally disenrolled at their own request. The letter of denial failed to address Peavy's contention that he was denied the option to cancel the

extension prior to enrollment. The Board also denied Peavy's request and failed to address the issue of the option to cancel prior to enrollment.

The district court concluded that both Peavy's extension and the Navy's subsequent refusals to cancel comported with regulations. The court also relied in denying Peavy's habeas corpus on the automatic advancement agreement and the benefits (training, promotion, pay raise) which flowed from the extension agreement.

The federal courts have habeas corpus jurisdiction over claims of unlawful detention by members of the military, In re Kelly, 401 F.2d 211 (5th Cir. 1968). The standard of review varies with the military decision or action complained of. Habeas corpus review of convictions by court-martial is limited to questions of jurisdiction, O'Callahan v. Parker, 395 U.S. 258 . . . (1969), and the limited function of determining whether the military has given fair consideration to petitioners' claims, Burns v. Wilson, 346 U.S. 137 . . . (1953). A challenge to a discretionary decision will be reviewed under an abuse of discretion or failure to exercise discretion standard. Nixon v. Secretary of Navy, 422 F.2d 934 (2d Cir. 1970); Bluth v. Laird, 435 F.2d 1065 (4th Cir. 1970). Discretionary decisions on conscientious-objector applications are reviewed under the same standards as are decisions by draft boards--the "any basis in fact for the decision" test, Pitcher v. Laird, 421 F.2d 1272 (5th Cir. 1970); Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968). In reviewing the claims that a branch of the military failed to comply with its own regulations the courts will look simply for a showing by the claimant that the regulation was not followed and for a showing of prejudice to the petitioner. Friedberg v. Resor, 453 F.2d 935 (2d Cir. 1971); Nixon v. Secretary of Navy, supra; Bluth v. Laird,

supra. Finally, claims that enlistment contracts are invalid or have been breached are decided under traditional notions of contract law. Shelton v. Brunson, 465 F.2d 144 (4th Cir. 1972); Johnson v. Chafee, 469 F.2d 1216 (9th Cir. 1972); Chalfant v. Laird, 420 F.d 945 (9th Cir. 1969).

If Peavy's enrollment in advanced training was valid and binding, Naval regulations precluded cancellation of his two year-extension. The essence of Peavy's claim is that the Navy breached the original extension agreement by failing to allow him to cancel the extension before enrollment in advanced training. Additionally, he insists that the automatic advancement agreement (referred to by the district court as a reaffirmation of the extension agreement) was invalid because he was induced to execute it by the misrepresentations of Navy authorities. The Navy concedes that Peavy could have cancelled the original extension prior to enrollment, but contends that Peavy made no cognizable efforts to cancel it and that the executed automatic advancement agreement conclusively showed that Peavy intended to fulfill the extension agreement and negates his contention that he sought to cancel the extension.

The district court either failed to consider or failed to make findings regarding this contractual dispute. Although evidence in the record--Peavy's testimony and letters written by Peavy's father corroborating Peavy's statements--supports Peavy's position, we cannot say as a matter of law that Peavy sought cancellation and that the Navy invalidly refused or ignored his requests during the period in which it is now conceded the extension could have been cancelled. Therefore, on remand the district court should make appropriate findings. If the court concludes: (1) that the Navy refused Peavy's

requests for cancellation; or (2) that the Navy through misrepresentation induced Peavy to execute the "reaffirmation" agreement, then he is entitled to cancellation of the remainder of his extension.

Reversed and remanded.

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b. Recruiter Representations. The courts are split on the question whether the military is bound by unauthorized representations by recruiters. Some courts have held that representations[2] bind the military while others have held that they do not bind the military.[3]

c. Remedy. If a court finds that the military has breached the terms of an enlistment contract, the usual remedy is rescission of the contract or cure, at the option of the military.[4] To order rescission of an enlistment contract, however, a court ordinarily must find a breach so substantial or fundamental as to go to the root of the contract. A minor or de minimis breach is not enough.[5]

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[2]Helton v. United States, 532 F. Supp. 813 (S.D. Ga. 1982); Withum v. O'Connor, 506 F. Supp. 1374 (D.P.R. 1981). See Tartt v. Sec'y of Army, 841 F. Supp. 236 (N.D. Ill. 1993) (allowing discovery concerning whether material misrepresentations induced enlistment).

[3]McCracken v. United States, 502 F. Supp. 561 (D. Conn. 1980).

[4]Pence v. Brown, 627 F.2d 872 (8th Cir. 1980); Brown v. Dunleavy, 722 F. Supp. 1343 (E.D. Va. 1989); Allen v. Weinberger, 546 F. Supp. 455 (E.D. Mo. 1982); Mansfield v. Orr, 545 F. Supp. 118 (D. Md. 1982).

[5]See Schneble v. United States, 614 F. Supp. 78, 83 (S.D. Ohio 1985) (clerical error in activation orders); Allen v. Weinberger, 546 F. Supp. 455 (E.D. Mo. 1982) (same).

7.3 **Conscientious Objectors.**

In the Army, conscientious objectors are governed by AR 600-43.[6] Under this regulation, applicants have the burden of establishing their conscientious objector status by clear and convincing evidence.[7] If their application is denied and they seek review of the determination in the federal courts, the denial is reviewed under the narrowest standard known to the law: the "basis-in-fact" test.[8] Under this test, the reviewing court does not weigh the evidence or determine whether substantial evidence exists to support the denial. Instead, the court searches the record for some evidence to support the military's finding; any proof incompatible with an applicant's claim is sufficient to sustain the administrative determination.[9] The following case illustrates the "basis-in-fact" test.

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[6]Dep't of Army, Reg. No. 600-43, Conscientious Objection (7 Aug. 1987).

[7]Id. para. 1-7c.

[8]E.g., Estep v. United States, 327 U.S. 114, 122-23 (1946); Koh v. United States, 719 F.2d 1384 (9th Cir. 1983); Wiggins v. Sec'y of Army, 751 F. Supp. 1238 (W.D. Tex. 1990), aff'd, 946 F.2d 892 (5th Cir. 1991); McAliley v. Birdsong, 451 F.2d 1244 (6th Cir. 1971); Helwick v. Laird, 438 F.2d 959 (5th Cir. 1971).

[9]Woods v. Sheehan, 987 F.2d 1454 (9th Cir. 1993); Taylor v. Claytor, 601 F.2d 1102, 1103 (9th Cir. 1979); Goodrich v. Marsh, 659 F. Supp. 855, 857 (W.D. Ky. 1987). See Hagar v. Sec'y of Air Force, 938 F.2d 1449 (1st Cir. 1991) (suspicion and speculation are not sufficient to form a basis in fact).

KOH v. SECRETARY OF THE AIR FORCE

719 F.2d 1384 (9th Cir. 1983)

Before SWYGERT, NELSON and CANBY, Circuit Judges.

SWYGERT, Senior Circuit Judge:

The Secretary of the Air Force ("Secretary") appeals from the district court's judgment, 559 F. Supp. 852, that the Secretary lacked a "basis in fact" to deny Dr. Audrey S. Koh's application for conscientious objector status. In Taylor v. Claytor, 601 F.2d 1102 (9th Cir. 1979), we discussed the standard of judicial review of the military's denial of conscientious objector status:

> Once the applicant has asserted a prima facie claim for conscientious objector status, the burden of proof shifts to the government to demonstrate "a basis in fact" for denial of his application. Judicial review under the "basis in fact" test is "the narrowest review known to the law." Sanger v. Seamans, 507 F.2d 814, 816 (9th Cir. 1974). The reviewing court does not weigh the evidence for itself or ask whether there is substantial evidence to support the military authorities' denial of the applicant's request for conscientious objector status. Witmer v. United States, . . ., 348 U.S. [375] at 380-81 [75 S. Ct. 392 at 395, 99 L.Ed. 428], ... Rather, the court "search[es] the record for some affirmative evidence" to support the authorities' overt or implicit finding that the applicant "has not painted a complete or accurate picture of his activities." [citation omitted].

> Put another way, the reviewing court should look for "some proof that is incompatible with the applicant's claims." [citation omitted].

601 F.2d at 1103.

We mention here three of the five "facts" upon which the Secretary based the denial. First, Koh's two previous applications for discharge were based upon grounds other than an opposition to war in any form. In these earlier applications, Koh alleged that she had been misled about the terms of her military commitment, and that the overall milieu of the military was not compatible with her own expectations or lifestyle. Koh objected to the bureaucracy, regimentation, isolation, and sexism of the military, but Koh did not express moral, religious, or philosophical opposition to war. Second, Koh submitted her conscientious objector claim one month after receiving active duty orders. While the timing of a conscientious objector claim cannot be the only basis for a finding of insincerity, it can be one of the facts which casts doubt on an applicant's sincerity. Christensen v. Franklin, 456 F.2d 1277, 1278 (9th Cir. 1972). Third, Koh enrolled in a medical training program which conflicted with her military commitment.

The district court's treatment of these facts was an improper application of the standard of review set forth in Taylor v. Claytor, supra. The sole question is whether there was some proof that is incompatible with the applicant's claims. These three facts taken together provided the Secretary with a basis in fact to conclude that expedience rather than sincerity prompted the application.

The judgment of the district court is reversed.

7.4 **Violation of Statutes and Regulations.**

a. General Rule. Although federal courts will give considerable deference to the armed forces' interpretation of the statutes they administer[10] and their own regulations,[11] the courts will not hesitate to overturn a determination made by military decisionmakers in violation of statute or regulation.[12] The following case is an example of a court's reaction to an administrative determination made in violation of a regulation:

WATKINS v. UNITED STATES ARMY

541 F. Supp. 249 (W.D. Wash. 1982)

MEMORANDUM AND ORDER

ROTHSTEIN, District Judge.

THIS MATTER comes before the court on the parties' cross motions for summary judgment. These motions incorporate the

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[10]Barnet v. Weinberger, 818 F.2d 953, 960 (D.C. Cir. 1987). See generally Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844-45 (1984); Blum v. Bacon, 457 U.S. 132, 141 (1982); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-81 (1969); Edwards' Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827).

[11]United States v. Saade, 800 F.2d 269, 271 (1st Cir. 1986); Wronke v. Marsh, 787 F.2d 1569 (Fed. Cir.), cert. denied, 479 U. S. 853 (1986). See generally INS v. Stanisic, 395 U.S. 62, 72 (1969); Udall v. Tallman, 380 U.S. 1 (1965).

[12]Vitarelli v. Seaton, 359 U.S. 535 (1959); Harmon v. Brucker, 355 U.S. 579 (1958); Service v. Dulles, 354 U.S. 363 (1957); United States ex rel. Accardi v. Shaughnessey, 347 U.S. 260 (1954); Dilley v. Alexander, 603 F.2d 914 (D.C. Cir. 1979); Arens v. United States, 969 F.2d 1034 (Fed. Cir. 1992). But see Sargisson v. U.S., 913 F.2d 918 (Fed. Cir. 1990) (determination will not be disturbed where error was not prejudicial).

arguments made in support of and in opposition to defendants' earlier motion to dismiss. The history of the litigation is as follows.

On October 13, 1981 plaintiff filed an amended complaint seeking a temporary restraining order and preliminary and permanent injunctions prohibiting defendants from discharging plaintiff from the United States Army on grounds of homosexuality. At a hearing on plaintiff's application for the temporary restraining order on October 23, plaintiff asked the court to enjoin an Army administrative discharge board, scheduled to convene on October 28, from considering plaintiff for discharge. The court declined to enter a restraining order, but retained jurisdiction over plaintiff's request for preliminary injunctive relief and directed the parties to inform the court before any action adverse to plaintiff was taken pursuant to a recommendation that the discharge board might make.

The three member board convened at Fort Lewis, Washington on October 28. After hearing testimony and the arguments of counsel, on October 29 a two member majority found that plaintiff was "undesirable for further retention in the military service because he has stated that he is a homosexual," and recommended that plaintiff be issued an honorable discharge certificate. Transcript of Proceedings (Tr.) at 429. The dissenting member concluded that plaintiff had not been proved to be a homosexual as defined by Army regulations and recommended that plaintiff not be discharged. Id.

Major General Robert M. Elton, commander of the 9th Infantry Division of the United States Army and the discharge authority for the administrative proceeding, requested an exception to the application of Army Regulation (AR) 635-200, para. 1-19b from Headquarters, Department of the Army (HQDA). Defendants' Memorandum at 7.

Plaintiff submitted a rebuttal letter. Exhibit A to Plaintiff's Motion to Strike Defendants' Motion to Dismiss. After HQDA granted the requested exception, MG Elton approved the finding and recommendation of the majority and made the following additional finding:

> I also find, based upon a preponderance of the evidence properly before the board, that SSG Perry J. Watkins has engaged in homosexual acts with other soldiers.

Report of Proceedings at 3. MG Elton directed plaintiff's discharge to occur on April 19, 1982. On April 12 this court, having retained jurisdiction over plaintiff's motion for injunctive relief, entered a preliminary injunction staying plaintiff's discharge from the Army until the court could rule on the instant motions for summary judgment. On May 7, 1982 defendants filed a notice of appeal from the court's injunction. Before proceeding further with a discussion of the instant motions, the court must indicate that an appeal from a preliminary injunction does not divest the trial court of jurisdiction to proceed with the action on the merits. Ex parte National Enameling & Stamping Co., 201 U.S. 156, 162, 26 S. Ct. 404, 406, 50 L.Ed. 707 (1906); Phelan v. Taitano, 233 F.2d 117, 119 (9th Cir. 1956); Thomas v. Board of Education, 607 F.2d 1043, 1047 n.7 (2d Cir. 1979), cert. denied, 444 U.S. 1081, 100 S. Ct. 1034, 62 L.Ed.2d 765 (1980); 9 Moore's Federal Practice para.. 203.11, at 3-54 & n.42 (2d ed. 1980).

The facts of the case are not in dispute. On August 27, 1967, plaintiff reported to an Army facility for his preinduction physical

examination. On a Report of Medical History plaintiff checked the box "YES" indicating that he then had homosexual tendencies or had experienced homosexual tendencies in the past. Tr. at Inclosure 7. A psychiatrist evaluated plaintiff and found him "qualified for admission." Id. Following induction and training, plaintiff served in the United States and Korea as a chaplain's assistant, personnel specialist, and company clerk. Defendants' Memorandum at 3. While at Fort Belvoir, Virginia, in November 1968, plaintiff stated to an Army Criminal Investigation Division agent that he had been a homosexual since the age of 13 and had engaged in homosexual relations with two servicemen. Tr. at Inclosure 9. The investigation of plaintiff for committing sodomy, a criminal offense under Article 125 of the Uniform Code of Military Justice, 10 U.S.C. § 925, was dropped because of insufficient evidence. Tr. at Inclosure 10, at 2. Plaintiff received an honorable discharge from the Army on May 8, 1970 at the conclusion of his tour of duty. Official Military Personnel File at 47. His reenlistment eligibility code was listed as "unknown." Id.

In May 1971, plaintiff requested correction of the reenlistment designation in his release papers, and on June 3 the Army notified him that his reenlistment code had been corrected to category 1, "eligible for reentry on active duty." Id. at 48. On June 18 plaintiff reenlisted for a period of three years. Id. at 56. During the fall of 1971, with the permission of the acting commanding officer of his unit, plaintiff performed an entertainment act as a female impersonator before the troops at a celebration of Organization Day for the 56th Brigade. Amended Complaint para. 19. Plaintiff's performance was reported in the December 1, 1971 issue of Army Times, a publication distributed to Army personnel worldwide. Id. para. 20. In the spring of 1972,

plaintiff performed as a female impersonator at the Volks Festival in Berlin, West Germany, with the express permission of his commanding officer. Id. para. 22. In January 1972, plaintiff was denied a security clearance based on his November 1968 statements concerning his homosexuality. Military Intelligence File at 22.

On March 21, 1974 plaintiff reenlisted for six years and was subsequently reassigned to South Korea as a company clerk. Official Military Personnel File at 65. In October 1975, plaintiff's commander initiated elimination proceedings against plaintiff for unsuitability due to homosexuality pursuant to AR 635-200, Chapter 13. On October 14, 1975, a four member board convened at Camp Mercer, South Korea and heard testimony indicating that plaintiff was a homosexual and the arguments of counsel. Military Intelligence File at 84. Captain Albert J. Bast III testified that as plaintiff's commander he had discovered, through a background records check, that plaintiff had a history of homosexual tendencies. When Bast asked plaintiff about it, plaintiff stated that he was a homosexual. Id. at 85. Bast testified further that plaintiff was "the best clerk I have known," and that plaintiff's homosexuality did not affect the company. Id. First Sergeant Owen Johnson testified that everyone in the company knew that plaintiff was a homosexual and that plaintiff's homosexuality had not caused any problems or elicited any complaints. Id. at 86. The board made the following unanimous finding: "SP5 Perry J. Watkins is suitable for retention in the military service." Id. at 87. The board's recommendation was that plaintiff "be retained in the military service," and that plaintiff was "suited for duty in administrative positions and progression through Specialist rating." Id. The convening authority apparently agreed with the board's finding and recommendations.

Following an assignment in the United States as a unit clerk, plaintiff was reassigned to Germany, where he served as a clerk and a personnel specialist with the 5th United States Army Artillery Group. In November 1977, the commander of the 5th USAAG granted plaintiff a security clearance for information classified as "Secret." Id. at 14. Thereafter plaintiff applied for a position in the Nuclear Surety Personnel Reliability Program, to qualify for which an applicant must have a security clearance for information classified as "Secret" and must pass a background investigation check. Amended Complaint para. 28. Plaintiff was initially informed that, because his medical records showed he had homosexual tendencies, he was ineligible for a position in the program. Defendants' Memorandum at 5 n.1; Amended Complaint para. 29. Plaintiff appealed. Id. para. 30. In support of his appeal plaintiff's commanding officer, Captain Dale E. Pastian, requested that plaintiff be requalified because plaintiff had been medically cleared, because of plaintiff's "outstanding professional attitude, integrity, and suitability for assignment" in the program, and because the 1975 Chapter 13 board recommended that plaintiff be retained and be allowed to progress in the military. Military Intelligence File at 68. Examining physician Lieutenant Colonel J. C. De Tata, M.D., concluded that plaintiff's homosexuality appeared to cause no problems in his work and noted that plaintiff had been through a Chapter 13 board "with positive results." Id. at 70. The decision to deny plaintiff's eligibility for the Nuclear Surety Program was reversed and plaintiff was accepted into the program in July 1978. Id. at 64.

Following an investigation by military intelligence in the spring of 1979, the commander of the U.S. Army Personnel Clearance Facility by letter dated December 18, 1979, notified plaintiff of the Army's

intent to revoke his security clearance. Id. at 12. The letter stated that revocation was being sought "because during an interview on 15 March 1979, you stated that you have been a homosexual for the past 15 to 20 years." Id. Plaintiff submitted a rebuttal letter on May 29, 1980, admitting making that statement. Id. at 8. The commanding officer of the Central Security Facility revoked plaintiff's security clearance by letter dated July 10, 1980. Id. at 6.

In February 1981, plaintiff appealed the revocation to the Office of the Assistant Chief of Staff for Intelligence. Amended Complaint, Exhibit J-2. Upon discovering in May that his appeal letter had apparently been misplaced or lost, plaintiff sent a second copy of the February letter to Ronald W. Morgan of the Office of the Assistant Chief of Staff for Intelligence. Id. para. 35. That office referred the matter to the Army's Deputy Chief of Staff for Personnel for a determination whether the newly promulgated Chapter 15 of AR 635-200 required or permitted plaintiff's discharge. Defendants' Memorandum at 6. The Assistant Chief of Staff's Office stayed action on plaintiff's appeal pending the determination whether proceedings under Chapter 15 would be commenced. Declaration of Ronald W. Morgan, filed April 12, 1982. Plaintiff brought this action on August 31, 1981, challenging the revocation of his security clearance because he had admitted to being a homosexual and seeking to prevent his discharge from the Army for homosexuality.

After receiving an opinion from the Judge Advocate General (JAG) of the Army that AR 635-200, para. 1-19b, the Army's regulatory "double jeopardy" provision, did not preclude plaintiff's discharge for homosexuality, the Deputy Chief of Staff's Office referred the matter to plaintiff's commander for appropriate action under

Chapter 15. Defendant's Memorandum at 6; see Tr. at Inclosure 4. Plaintiff received notice of his commander's decision to hold a Chapter 15 discharge proceeding by letter dated September 17, 1981. Tr. at Inclosure 3. Plaintiff amended his complaint on October 12 and sought a temporary restraining order enjoining the Army from convening an administrative discharge board. As stated earlier, the court declined to enter a temporary restraining order, the board recommended that plaintiff be given an honorable discharge, and MG Elton approved that recommendation.

Plaintiff's amended complaint alleges that the revocation of his security clearance violates substantive and procedural due process requirements, the First Amendment, principles of equal protection, and is based on an unconstitutionally vague provision. Plaintiff further alleges that discharging him under AR 635-200, Chapter 15 is unconstitutional because Chapter 15 is void on its face and as applied to plaintiff, and because due process, privacy, First Amendment and estoppel principles prevent it. Plaintiff prays for a permanent injunction barring defendants from discharging plaintiff from the Army on grounds of homosexuality, and requiring defendants to reinstate plaintiff's security clearance and not revoke it in the future based on plaintiff's homosexuality. Plaintiff also requests a declaratory judgment that AR 635-200, Chapter 15 is unconstitutional on its face. Finally, plaintiff asks that the court enter an injunction prohibiting defendants from ever failing to promote or decorate, or from taking any action to retard or hinder plaintiff's Army career because of his homosexuality.

[The court held that plaintiff's claim was reviewable and that he need not exhaust administrative remedies.]

III. Validity of Plaintiff's Discharge

Having determined that plaintiff's claims are presently reviewable, the court turns to the question whether the decision to discharge plaintiff was proper. The military decision must be affirmed unless it was arbitrary or capricious, unsupported by substantial evidence, or contrary to law. Sanford v. United States, 399 F.2d 693, 694 (9th Cir. 1968) (per curiam); Hodges v. Callaway, supra, 499 F.2d at 423; Peppers v. United States Army, 479 F.2d 79, 83-84 (4th Cir. 1973); Doe v. Chafee, 355 F. Supp. 112, 114 (N.D. Cal. 1973); see 5 U.S.C. § 706(2)(C), (D).

It is well settled that the Army must abide by its own regulations. Harmon v. Brucker, 355 U.S. 579, 582, 78 S. Ct. 433, 435, 2 L.Ed.2d 503 (1958) (per curiam); Grimm v. Brown, 449 F.2d 654 (9th Cir. 1971); Van Bourg v. Nitze, 388 F.2d 557 (D.C. Cir. 1967). The Army regulation at issue in this case provides in pertinent part as follows:

> b. Separation pursuant to this regulation should not be based on conduct which has already been considered at a prior administrative or judicial proceeding and disposed of in a manner indicating that separation is not warranted. Accordingly, administrative separations under the provisions of chapter 13, 14 and 15 of this regulation and AR 604-10 are subject to the following restrictions and no member will be considered for administrative separation because of conduct which--
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> . . . .

(2) Has been the subject of administrative proceedings resulting in a final determination that the member should be retained in the service.

. . . .

c. The restrictions in b above are not applicable when--

(1) Substantial new evidence, fraud, or collusion is discovered, which was not known at the time of the original proceeding, despite the exercise of due diligence, and which will probably produce a result significantly less favorable for the soldier at a new hearing.

(2) Subsequent conduct by the soldier warrants consideration for separation. Such conduct need not independently justify the soldier's discharge, but must be sufficiently serious to raise a question as to his potential for further useful military service. This exception, however, does not permit further consideration of conduct of which the soldier has been absolved in a prior final factual determination by an administrative or judicial body.

(3) An express exception has been granted by HQDA pursuant to a request by a convening authority through channels that, due to the unusual circumstances of the case, administrative separation should be accomplished. Prior to forwarding the case, however, the member will be advised of the convening authority's intentions in this regard, given the opportunity to review the proposed

> forwarding correspondence, and be permitted to present written matters in rebuttal thereto if desired.

AR 635-200, para. 1-19b & c (September 1, 1981) (emphasis added).

As stated earlier, in October 1975, a four member administrative board, convened to consider whether plaintiff should be discharged under the predecessor regulation to Chapter 15, unanimously recommended that plaintiff "be retained in the military service" and be eligible for promotion. The board's determination apparently was adopted by the discharge authority and became final. Defendants' Memorandum at 6.

At the close of the Army's case at Fort Lewis last October, the Legal Advisor heard argument on the applicability of para. 1-19b. He ruled that para. 1-19b was inapplicable for two reasons. Under para. 1-19c(2), he found that there was proof of subsequent conduct on the part of plaintiff which the board was entitled to consider. Tr. at 228-29. That conduct evidently could include, or be limited to, plaintiff's March 15, 1979, statement to a military intelligence agent that he was a homosexual, as is reflected by the Advisor's instructions to the board. Tr. at 417-18. Second, the Advisor found that Inclosure 4 to the Transcript of Proceedings, consisting of a letter from HQDA, was an express exemption to the applicability of para. 1-19b. Plaintiff excepted to the ruling.

The court is constrained to hold that the Advisor's ruling was arbitrary, unsupported by substantial evidence, and contrary to law. "Subsequent conduct" evidence consisted of testimony relating to two incidents. Specialist Fourth Class Andrew K. Snook testified to being

picked up while hitchhiking on or about July 4, 1980, by a black staff sergeant in a silver or gray car with light colored license plates. Snook testified that the sergeant squeezed his leg in a homosexual advance. Snook was unable to identify plaintiff in a line-up conducted on October 28, 1981, at Fort Lewis. Captain Hugh M. Bryan, who was the unit commander at Fort Lewis in 1980 when the alleged incident took place, testified that after talking with Snook he believed that the staff sergeant who had given Snook a ride was plaintiff. Plaintiff later testified to owning a silver car with light colored license plates. On cross examination, Captain Bryan admitted that there were probably thousands of black staff sergeants at Fort Lewis, and that probably a couple of hundred of them had light colored cars.

The other alleged incident was testified to by PFC David P. Valley. Valley testified that plaintiff asked him if he'd like to move into plaintiff's apartment with him, and that plaintiff used to come by the mailroom and stare at Valley. Plaintiff denied both allegations. On cross examination, Valley indicated that he was not sure that plaintiff had been making an advance toward him. In addition, Valley admitted to being prejudiced against black people and against homosexuals, having once had a bad experience with a homosexual, and related that he had been disciplined once by a board of which plaintiff was a member. The rest of the evidence presented by the Army was relevant only to the quality of plaintiff's performance and the character of the discharge plaintiff would receive.

The board rejected the evidence that plaintiff had engaged in homosexual acts with Snook and Valley. It returned the single finding that plaintiff had stated he was a homosexual, and, following the Advisor's instructions, made the recommendation that plaintiff be

discharged. Plaintiff's candid admission in 1967 that he had homosexual tendencies undoubtedly would have been a proper basis for denying him eligibility for service duty or enlistment. See Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980). Plaintiff's restatement of that fact subsequent to 1975, however, standing alone, cannot justify his discharge. No member can be separated "because of conduct which . . . has been the subject of administrative proceedings resulting in a final determination that the member should be retained in the service." AR 635-200, para. 1-19b(2). The 1975 Chapter 13 board had before it evidence that plaintiff admitted he was a homosexual. The regulation in effect at that time provided for separation of members who had homosexual tendencies whether or not homosexual acts had been committed. AR 635-200, para. 13-5(b)(5) (effective November 23, 1972). The 1975 proceedings resulted in a final determination that plaintiff should be retained in the Army. Accordingly, plaintiff cannot be separated because he had admitted that he is a homosexual.

The fact that he had repeated his admission subsequent to 1975 does not change this result. Plaintiff's admissions appear to have been made, in every instance, in response to questioning by a superior officer. Aside from the unfairness of penalizing plaintiff for his honesty in responding to official questioning, plaintiff's reiteration of a fact which the 1975 Chapter 13 board found did not require his separation cannot be considered "subsequent conduct" under para. 1-19c(2). That fact was the subject of the prior administrative proceeding.

The Legal Advisor was also in error in ruling that the letter from HQDA, Inclosure 4 to the Transcript of Proceedings, was an "express exception" to the double jeopardy bar of para. 1-19b(2). See Tr. at 231. Inclosure 4 does not even purport to be an express exception

under para. 1-19c(3), nor were the procedural requirements of that paragraph followed with respect to Inclosure 4. Were Inclosure 4 such an exception, MG Elton would have had no need to petition HQDA for an exception ruling after he received the board's recommendation.

Defendants argue, however, that the express exception obtained by MG Elton sometime after December 23, 1981, permits plaintiff's discharge. The court cannot agree. The administrative discharge board concluded on October 29, 1981, that plaintiff should be discharged because he had stated he was a homosexual. Yet the regulation only permits separation under Chapter 15 when an exception "has been granted . . . [p]rior to forwarding the case. . . ." AR 635-200, para. 1-19c(3) (emphasis added). The exemption obtained by MG Elton sometime after December was not a prior express exemption as is contemplated by the regulation. In Cuadra v. Resor, 437 F.2d 1211 (9th Cir. 1970) (per curiam), the Army's failure to follow its own regulation, which required it to obtain Selective Service advice before acting on an application for a hardship discharge, required vacation of the district court's judgment for the Army. The Army had denied plaintiff's application for discharge, then, after plaintiff sued, had sought Selective Service advice. Similarly, in the case at bar, the Army convened the discharge board which recommended discharge, then, after plaintiff raised the bar of para. 1-19b at the proceeding, obtained the exemption allowing it to accomplish separation. Defendants' Memorandum at 7.

Even if retroactive application were sufficient under para. 1-19c(3), however, the determination by HQDA that an express exception was proper was arbitrary. The Adjutant General's letter requesting the express exception argues that para. 1-19b(2) does not

make "any allowance for eliminations based upon a change in policy." See Exhibit A to Plaintiff's Motion to Strike Defendants' Motion to Dismiss. It then requests that an exception be granted because the new policy expressed in Chapter 15 is an "unusual circumstance." The flaw in the Adjutant General's argument, and HQDA's action thereon, is apparent. Paragraph 1-19b itself states: "[A]dministrative separations under the provisions of chapter 13, 14 and 15 of this regulation . . . are subject to the [double jeopardy] restrictions. . . ." Hence HQDA's determination that the new policy expressed in Chapter 15 was an "unusual circumstance" that warranted denying plaintiff the protection of para. 1-19b(2) was contrary to para. 1-19b itself.

The court's determination that the instant discharge of plaintiff is void because it cannot be predicated on his statements that he is a homosexual is bolstered by evidence that the Army previously declined to process plaintiff under Chapter 15 because of the double jeopardy bar. Major Palmer Penny, 9th Aviation Battalion, testified at the Chapter 15 proceedings that in the summer of 1980 he had looked into holding a Chapter 13 proceeding. Penny stated that he had contacted members of the Adjutant General's office to ascertain whether a Chapter 13 proceeding was possible. Tr. at 69. According to Penny, "the AG folks" had told him that a Chapter 13 was not permissible because plaintiff had already been cleared by a prior Chapter 13 board. Id. at 70, 73 ("[A]ll avenues were closed unless Sergeant Watkins . . . approached someone. . . ." Id. at 72.). Then, after Private Snook complained about the hitchhiking incident, Penny again sought advice from the Adjutant General's office. Penny testified that the Adjutant General's office advised him that the Snook incident did not constitute

substantial evidence against plaintiff. Id. at 74-75. The matter was therefore dropped. Id.

Nor does MG Elton's supplemental finding of acts render the double jeopardy bar inapplicable. The regulation states that, if the administrative board recommends discharge, the discharge authority shall "(1) Approve the finding and direct separation; or (2) Disapprove the finding. . . ." AR 635-200, para. 15-11b; accord, 32 C.F.R. § 41.13(e)(4)(ii)(B). The option to make additional findings is not available.

In light of all the foregoing, noting in particular the basic unfairness of discharging plaintiff because he repeated after 1975 the same statement he made at every critical juncture during his Army career, the court rules that plaintiff's motion for summary judgment is GRANTED IN PART and DENIED IN PART as follows:

1. Defendants may not discharge plaintiff because he has stated in the past or will state in the future that he is a homosexual. The court expresses no opinion whether plaintiff can validly be discharged in the event the Army proves the commission of homosexual acts by plaintiff that have not been the subject of administrative proceedings.

. . . .

5. The court further Orders that plaintiff's status shall not be diminished by defendants as a result of this lawsuit; this includes, but is not limited to, plaintiff's right to attend Army training programs.

Defendants' motion for summary judgment is DENIED.

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b. Prerequisites to Enforcement of Statute or Regulation. Two conditions are imposed on judicial enforcement of statutory or regulatory provisions. First, the provision must be for the benefit of the individual--that is, the individual must fall within the "zone of interests" of the statute or regulation.[13] Second, the putative violation must prejudice the plaintiff challenging the military's determination.[14]

7.5 Constitutional Violations.

a. General. The Supreme Court has never clearly articulated a standard for the review of constitutional challenges to military administrative determinations or policies. Therefore, generalizations about the manner in which the federal courts should treat such challenges are difficult to make. However, that the Supreme Court will grant considerable deference to military decisions even in the face of a clear constitutional challenge. This deference is grounded in the Court's concern over preserving discipline in the armed forces, a theme that has appeared in Supreme Court decisions over the past century.[15] This concern has justified judicial acceptance of sometimes substantial

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[13]See, e.g., Allgood v. Kenan, 470 F.2d 1071 (9th Cir. 1972); Silverthorne v. Laird, 460 F.2d 1175 (5th Cir. 1972); Cortright v. Resor, 447 F.2d 245 (2d Cir. 1971), cert. denied, 405 United States 965 (1972); Hadley v. Sec'y of Army, 479 F. Supp. 189 (D.D.C. 1979).

[14]See, e.g., Connor v. United States Civil Serv. System, 721 F.2d 1054 (6th Cir. 1983); Knehans v. Alexander, 566 F.2d 312 (D.C. Cir. 1977), cert. denied, 435 U.S. 995 (1978). Cf. Dodson v. United States Government, Dep't of Army, 988 F.2d 1199 (Fed. Cir. 1993) (proof of prejudice not required).

[15]See, e.g., In re Grimley, 137 U.S. 147, 153 (1890) ("An Army is not a deliberative body. It is the executive arm. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier"); Burns v. Wilson, 346 U.S. 137, 140 (1953) ("the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline"); Schlesinger v. Councilman, 420 U.S. 738, 757 (1975) ("the military must insist upon a respect for discipline without

footnote continued next page

restrictions on soldiers' speech,[16] severe limitations on the ability of soldiers to sue either the government or their superiors for injuries incurred incident to military service,[17] greatly circumscribed judicial review of court-martial proceedings,[18] tight control of military installations to the extent that civilians seeking entry to exercise constitutional rights can be barred,[19] and discrimination based on sex.[20] The Supreme Court's decision in Goldman v. Weinberger is an example of its deferential standard of review.

GOLDMAN v. WEINBERGER

106 S. Ct. 1310 (1986)

475 U.S. 503

Justice REHNQUIST delivered the opinion of the Court.

Petitioner S. Simcha Goldman contends that the Free Exercise Clause of the First Amendment to the United States Constitution

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(..continued)
counterpart in civilian life"); Brown v. Glines, 444 U.S. 348, 357 n.14 (1980) ("Loyalty, morale, and discipline are essential attributes of military service").

[16]See, e.g., Brown, 444 U.S. at 348; Sec'y of Navy v. Huff, 444 U.S. 453 (1979); Parker v. Levy, 417 U.S. 733 (1974).

[17]See, e.g., United States v. Stanley, 107 S. Ct. 3054 (1987); United States v. Johnson, 107 S. Ct. 2063 (1987); United States v. Shearer, 473 U.S. 52 (1985); Chappell v. Wallace, 462 U.S. 296 (1983); Feres v. United States, 340 U.S. 135 (1950).

[18]See, e.g., Schlesinger, 420 U.S. at 738; Burns, 346 at U.S. 137.

[19]See, e.g., United States v. Albertini, 472 U.S. 675 (1985); Greer v. Spock, 424 U.S. 828 (1976); but see Flower v. United States, 407 U.S. 197 (1972) (per curiam).

[20]Rostker v. Goldberg, 453 U.S. 57 (1981); Schlesinger v. Ballard, 419 U.S. 498 (1975); but see Frontiero v. Richardson, 411 U.S. 677 (1973).

permits him to wear a yarmulke while in uniform, notwithstanding an Air Force regulation mandating uniform dress for Air Force personnel. The District Court for the District of Columbia permanently enjoined the Air Force from enforcing its regulation against petitioner and from penalizing him for wearing his yarmulke. The Court of Appeals for the District of Columbia Circuit reversed on the ground that the Air Force's strong interest in discipline justified the strict enforcement of its uniform dress requirements. We granted certiorari because of the importance of the question, and now affirm.

Petitioner Goldman is an Orthodox Jew and ordained rabbi. In 1973, he was accepted into the Armed Forces Health Professions Scholarship Program and placed on inactive reserve status in the Air Force while he studied clinical psychology at Loyola University of Chicago. During his three years in the scholarship program, he received a monthly stipend and an allowance for tuition, books, and fees. After completing his Ph.D. in psychology, petitioner entered active service in the United States Air Force as a commissioned officer, in accordance with a requirement that participants in the scholarship program serve one year of active duty for each year of subsidized education. Petitioner was stationed at March Air Force Base in Riverside, California, and served as a clinical psychologist at the mental health clinic on the base.

Until 1981, petitioner was not prevented from wearing his yarmulke on the base. He avoided controversy by remaining close to his duty station in the health clinic and by wearing his service cap over the yarmulke when out of doors. But in April 1981, after he testified as a defense witness at a court-martial wearing his yarmulke but not his service cap, opposing counsel lodged a complaint with Colonel Joseph

Gregory, the Hospital Commander, arguing that petitioner's practice of wearing his yarmulke was a violation of Air Force Regulation (AFR) 35-10. This regulation states in pertinent part that "[h]eadgear will not be worn . . . [w]hile indoors except by armed security police in the performance of their duties." AFR 35-10, para. 1-6.h(2)(f) (1980).

Colonel Gregory informed petitioner that wearing a yarmulke while on duty does indeed violate AFR 35-10, and ordered him not to violate this regulation outside the hospital. Although virtually all of petitioner's time on the base was spent in the hospital, he refused. Later, after petitioner's attorney protested to the Air Force General Counsel, Colonel Gregory revised his order to prohibit petitioner from wearing the yarmulke even in the hospital. Petitioner's request to report for duty in civilian clothing pending legal resolution of the issue was denied. The next day he received a formal letter of reprimand, and was warned that failure to obey AFR 35-10 could subject him to a court-martial. Colonel Gregory also withdrew a recommendation that petitioner's application to extend the term of his active service be approved, and substituted a negative recommendation.

Petitioner then sued respondent Secretary of Defense and others, claiming that the application of AFR 35-10 to prevent him from wearing his yarmulke infringed upon his First Amendment freedom to exercise his religious beliefs. The United States District Court for the District of Columbia primarily enjoined the enforcement of the regulation, 530 F. Supp. 12 (1981), and then after a full hearing permanently enjoined the Air Force from prohibiting petitioner from wearing a yarmulke while in uniform. Respondents appealed to the Court of Appeals for the District of Columbia Circuit, which reversed. 236 U.S.App.D.C. 248, 734 F.2d 1531 (1984). As an initial matter,

the Court of Appeals determined that the appropriate level of scrutiny of a military regulation that clashes with a constitutional right is neither strict scrutiny nor rational basis. Id., at 252, 734 F.2d, at 1535-1536. Instead, it held that a military regulation must be examined to determine whether "legitimate military ends are sought to be achieved," Id., at 253, 734 F.2d, at 1536, and whether it is "designed to accommodate the individual right to an appropriate degree." Ibid. Applying this test, the court concluded that "the Air Force's interest in uniformity renders the strict enforcement of its regulation permissible." Id., at 257, 734 F.2d, at 1540. The full Court of Appeals denied a petition for rehearing en banc, with three judges dissenting. 238 U.S.App.D.C. 267, 739 F.2d 657 (1984).

Petitioner argues that AFR 35-10, as applied to him, prohibits religiously motivated conduct and should therefore be analyzed under the standard enunciated in Sherbert v. Verner, 374 U.S. 398, 406, 83 S. Ct. 1790, 1795, 10 L.Ed.2d 965 (1963). See also Thomas v. Review Board, 450 U.S. 707, 101 S. Ct. 1425, 67 L.Ed.2d 624 (1981); Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526, 32 L.Ed.2d 15 (1972). But we have repeatedly held that "the military is, by necessity, a specialized society separate from civilian society." Parker v. Levy, 417 U.S. 733, 743, 94 S. Ct. 2547, 2555, 41 L.Ed.2d 439 (1974). See also Chappell v. Wallace, 462 U.S. 296, 300, 103 S. Ct. 2362, 2365, 76 L.Ed.2d 586 (1983); Schlesinger v. Councilman, 420 U.S. 738, 757, 95 S. Ct. 1300, 1312-13, 43 L.Ed.2d 591 (1975); Orloff v. Willoughby, 345 U.S. 83, 94, 73 S. Ct. 534, 540, 97 L.Ed. 842 (1953). "[T]he military must insist upon a respect for duty and a discipline without counterpart in civilian life," Schlesinger v. Councilman, supra, 420 U.S., at 757, 95 S. Ct., at 1312-13, in order

to prepare for and perform its vital role. See also Brown v. Glines, 444 U.S. 348, 354, 100 S. Ct. 594, 599, 62 L.Ed.2d 540 (1980).

Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps. See, e.g., Chappell v. Wallace, supra, 462 U.S., at 300, 103 S. Ct., at 2365; Greer v. Spock, 424 U.S. 828, 843-844, 96 S. Ct. 1211, 1220, 47 L.Ed.2d 505 (1976) (POWELL, J., concurring); Parker v. Levy, supra, 417 U.S., at 744, 94 S. Ct., at 2556. The essence of military service "is the subordination of the desires and interests of the individual to the needs of the service." Orloff v. Willoughby, supra, 345 U.S., at 92, 73 S. Ct., at 539.

These aspects of military life do not, of course, render entirely nugatory in the military context the guarantees of the First Amendment. See, e.g., Chappell v. Wallace, supra, 462 U.S., at 304, 103 S. Ct., at 2367. But "within the military community there is simply not the same [individual] autonomy as there is in the larger civilian community." Parker v. Levy, supra, 417 U.S., at 751, 94 S. Ct., at 2559. In the context of the present case, when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest. See Chappell v. Wallace, supra, 462 U.S., at 305, 103 S. Ct., at 2368; Orloff v. Willoughby, supra, 345 U.S., at 93-94, 73 S. Ct., at 540. Not only are courts '"ill-equipped to determine the impact upon

discipline that any particular intrusion upon military authority might have,'" Chappell v. Wallace, supra, 462 U.S., at 305, 103 S. Ct., at 2368, quoting Warren, The Bill of Rights and the Military, 37 N.Y.U.L.Rev. 181, 187 (1962), but the military authorities have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy. "Judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." Rostker v. Goldberg, 453 U.S. 57, 70, 101 S. Ct. 2646, 2655, 69 L.Ed.2d 478 (1981).

The considered professional judgment of the Air Force is that the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission. Uniforms encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank. The Air Force considers them as vital during peacetime as during war because its personnel must be ready to provide an effective defense on a moment's notice; the necessary habits of discipline and unity must be developed in advance of trouble. We have acknowledged that "[t]he inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection." Chappell v. Wallace, supra, 462 U.S., at 300, 103 S. Ct., at 2365.

To this end, the Air Force promulgated AFR 35-10, a 190-page document, which states that "Air Force members will wear the Air Force uniform while performing their military duties, except when authorized to wear civilian clothes on duty." AFR § 35-10, para. 1-6

(1980). The rest of the document describes in minute detail all of the various items of apparel that must be worn as part of the Air Force uniform. It authorizes a few individualized options with respect to certain pieces of jewelry and hair style, but even these are subject to severe limitations. See AFR 35-10, Table 1-1, and para. 1-12.b(1)(b) (1980). In general, authorized headgear may be worn only out of doors. See AFR § 35-10, para. 1-6.h (1980). Indoors, "[h]eadgear [may] not be worn . . . except by armed security police in the performance of their duties." AFR 35-10, para. 1-6.h(2)(f) (1980). A narrow exception to this rule exists for headgear worn during indoor religious ceremonies. See AFR 35-10, para. 1-6.h(2)(d) (1980). In addition, military commanders may in their discretion permit visible religious headgear and other such apparel in designated living quarters and nonvisible items generally. See Department of Defense Directive 1300.17 (June 18, 1985).

Petitioner Goldman contends that the Free Exercise Clause of the First Amendment requires the Air Force to make an exception to its uniform dress requirements for religious apparel unless the accoutrements create a "clear danger" of undermining discipline and esprit de corps. He asserts that in general, visible but "unobtrusive" apparel will not create such a danger and must therefore be accommodated. He argues that the Air Force failed to prove that a specific exception for his practice of wearing an unobtrusive yarmulke would threaten discipline. He contends that the Air Force's assertion to the contrary is mere ipse dixit, with no support from actual experience or a scientific study in the record, and is contradicted by expert testimony that religious exceptions to AFR 35-10 are in fact desirable and will increase morale by making the Air Force a more humane place.

But whether or not expert witnesses may feel that religious exceptions to AFR 35-10 are desirable is quite beside the point. The desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment. Quite obviously, to the extent the regulations do not permit the wearing of religious apparel such as a yarmulke, a practice described by petitioner as silent devotion akin to prayer, military life may be more objectionable for petitioner and probably others. But the First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulations. The Air Force has drawn the line essentially between religious apparel which is visible and that which is not, and we hold that those portions of the regulations challenged here reasonably and evenhandedly regulate dress in the interest of the military's perceived need for uniformity. The First Amendment therefore does not prohibit them from being applied to petitioner even though their effect is to restrict the wearing of the headgear required by his religious beliefs.

The judgment of the Court of Appeals is Affirmed.

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b. Lower Court Applications of Deference. Some federal courts have attempted to construct a more definitive standard for reviewing constitutional challenges to military policies and administrative determinations. For example, in Katcoff v. Marsh,[21] which involved a challenge to congressional funding of the Army's chaplaincy, the United States Court of Appeals for the Second Circuit held that the military policies

[21]755 F.2d 223 (2d Cir. 1985).

were presumptively constitutional if they could be deemed reasonably relevant and necessary to further the national defense:

> The line where military control requires that enjoyment of civilian rights be regulated or restricted may sometimes be difficult to define. But caution dictates that when a matter provided for by Congress in the exercise of its war power and implemented by the Army appears reasonably necessary to furtherance of our national defense it should be treated as presumptively valid and any doubt as to its constitutionality should be resolved as a matter of judicial comity in favor of deference to the military's exercise of its discretion.[22]

To similar effect is the decision of the United States Court of Appeals for the District of Columbia Circuit, in Goldman v. Secretary of Defense,[23] The court held that the proper scope of its review was to determine "whether legitimate military ends are sought to be achieved by means designed to accommodate the individual right to an appropriate degree."[24]

7.6 **Discretionary Determinations.**

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[22]Id. at 234. See Mack v. Rumsfeld, 609 F. Supp. 1561 (W.D.N.Y. 1985), aff'd, 784 F.2d 438 (2d Cir.), cert. denied, 479 U.S. 815 (1986) (applying standard to constitutional challenge to single parent policies of Army and Air Force).

[23]734 F.2d 1531 (D.C. Cir. 1984), aff'd sub. nom. Goldman v. Weinberger, 475 U.S. 503 (1986).

[24]Id. at 1536, citing United States v. Robel, 389 U.S. 258, 268 n.20 (1967); Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994).

a. Standards of Review. Most military administrative determinations are purely discretionary in character. If such decisions are reviewable, the court will examine the decisions to ensure that they are supported by substantial evidence and are not arbitrary and capricious. Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion; it can be somewhat less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's finding from being supported by substantial evidence.[25] The arbitrary and capricious standard is a highly deferential standard that determines whether the decision challenged was based on relevant factors and whether there was a clear error in judgment.[26]

b. Examples. Examples of military administrative determinations subject to the substantial evidence/ arbitrary and capricious standard are decisions by the Correction Boards to deny relief,[27] medical fitness determinations,[28] adverse personnel

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[25]Cranston v. Clark, 767 F.2d 1319, 1321 (9th Cir. 1985). See Heisig v. United States, 719 F.2d 1153, 1157 (Fed. Cir. 1983).

[26]Cranston, 767 F.2d at 1321; Grieg v. United States, 640 F.2d 1261, 1266-67 (Ct. Cl. 1981), cert. denied, 455 U.S. 907 (1982); Marcotte v. Sec'y of Defense, 618 F. Supp. 756, 763 (D. Kan. 1985); Benvenuti v. Department of Defense, 613 F. Supp. 308, 311-12 (D.D.C. 1985). See Gilmore v. Lujan, 947 F.2d 1409 (9th Cir. 1991) (court reluctantly upheld government decision because compelled by the narrow scope of review).

[27]Miller v. Lehman, 801 F.2d 492, 496 (D.C. Cir. 1986); Smith v. Marsh, 787 F.2d 510, 512 (10th Cir. 1986); Dougherty v. United States Navy Bd. for Correction of Naval Records, 784 F.2d 499, 501 (3d Cir. 1986); Koster v. United States, 685 F.2d 407 (Ct. Cl. 1982); Johnson v. Reed, 609 F.2d 784 (5th Cir. 1980); Swann v. Garrett, 811 F. Supp. 1336 (N.D. Ind. 1992); Marcotte, 618 F. Supp. at 763; Benvenuti, 613 F. Supp. at 311-12; Mahoney v. United States, 610 F. Supp. 1065, 1068 (S.D.N.Y. 1985); Fairchild v. Lehman, 609 F. Supp. 287 (E.D. Va. 1985), aff'd, 814 F.2d 1555 (Fed. Cir. 1987).

actions against civilian employees,[29] separation of service academy cadets and midshipmen,[30] bar letters,[31] decisions under the Missing Persons Act,[32] and hardship discharge determinations.[33] The following is a typical case applying the substantial evidence/arbitrary and capricious standard.

(..continued)

[28]Heisig, 719 F.2d at 1153; Sidoran v. Commissioner, 640 F.2d 231 (9th Cir. 1981).

[29]5 U.S.C. § 7703(c); Sherman v. Alexander, 684 F.2d 464 (7th Cir. 1982), cert. denied, 459 U.S. 1116 (1983); Hoska v. Dep't of Army, 677 F.2d 131 (D.C. Cir. 1982).

[30]Dougherty v. Lehman, 688 F.2d 158 (3d Cir. 1982), aff'g 539 F. Supp. 4 (E.D. Pa. 1981); Love v. Hidalgo, 508 F. Supp. 177 (D. Md. 1981).

[31]S.A.F.E. Export Corp. v. United States, 803 F.2d 696 (Fed. Cir. 1986); Medina v. United States, 709 F.2d 104 (1st Cir. 1983), aff'g 541 F. Supp. 719 (D.P.R. 1982); Tokar v. Hearne, 699 F.2d 753 (5th Cir.), cert. denied, 464 U.S. 844 (1983).

[32]Luna v. United States, 810 F.2d 1105 (Fed. Cir. 1987); Cherry v. United States, 697 F.2d 1043 (Fed. Cir. 1983); Pitchford v. United States, 666 F.2d 533 (Ct. Cl. 1981).

[33]Jackson v. Allen, 553 F. Supp. 528 (D. Mass. 1982).

POWELL v. MARSH

560 F. Supp. 636 (D.D.C. 1983)

MEMORANDUM OPINION

CHARLES R. RICHEY, District Judge.

In his suit, plaintiff seeks review of a decision by the Army Board for Correction of Military Records ("ABCMR" or the "Board") that he was only 10% disabled at the time of his discharge. The Court now has before it Defendant's Motion to Dismiss, or, in the Alternative for Summary Judgment, plaintiff's opposition thereto and the entire record herein. For the reasons set forth herein, the Court will grant Defendant's Motion for Summary Judgment, thus refusing to disturb the ABCMR's decision denying plaintiff the record correction he sought.

BACKGROUND

Plaintiff enlisted in the Army in 1952 and served (with a short absence between enlistments) until 1966 when he was honorably discharged. In 1958, plaintiff volunteered to participate in a drug-related experiment, in the course of which, he received one dose of lysergic acid diethylamide (LSD) and then participated in a variety of simulated combat skills. Upon his separation from the Army, plaintiff underwent a physical examination that found that he was fit for duty. No psychological disorder was noted at that time. Nor was plaintiff diagnosed or treated for any mental disorder between 1958 and 1976, although he underwent medical treatment for a variety of internal complaints during that time period. Additionally, plaintiff was

continuously employed for the eight years following his discharge and did not seek any relief from the Army during this time.

In December of 1975, plaintiff applied to the Veterans Administration ("VA") for disability benefits for the first time. He claimed he was suffering from the disabling effects of an unknown drug administered to him in 1958. Plaintiff underwent medical and psychiatric examinations in connection with his application in early 1976. He was diagnosed as suffering from an "anxiety reaction." However, the VA determined that he was entitled to no disability benefits.

On January 22, 1979, plaintiff, through counsel, sought reconsideration by the VA of its 1976 rating decision denying him disability benefits. Counsel also informed the VA that plaintiff had received LSD in the 1958 Army experiments. Plaintiff again underwent a medical examination, and was awarded a 10% disability rating for a nonservice connected duodenal ulcer in July 18, 1980.

Prior to that decision, plaintiff applied to the ABCMR for the correction of his records. Plaintiff's application was based on the claim that he was disabled due to the 1958 experiment. He sought to convert his honorable discharge into a medical disability retirement with a 100% disability rating retroactive to the date of his separation.

In order to evaluate plaintiff's application, the ABCMR requested that the Office of the Surgeon General ("SG") determine whether plaintiff should have been retired because of disability, rather than honorably discharged. The SG concluded that plaintiff did not have a medical condition at the time of his separation that would have warranted disability retirement.

At the request of plaintiff's counsel and to further aid in evaluating plaintiff's application, the ABCMR received authorization to conduct a comprehensive mental and physical evaluation of plaintiff, at the Army's expense, in February of 1981. This evaluation, conducted at the Walter Reed Army Medical Center ("Walter Reed"), found that plaintiff suffered from chronic paranoid schizophrenia, the onset of which occurred during plaintiff's active duty. However, the evaluation found no causal connection between the LSD plaintiff received and the psychological condition from which he suffered. Instead, the conclusion was that the LSD incident was a "coincidental precipitant" to plaintiff's disorder.

Plaintiff was next sent to Brooke Army Medical Center ("Brooke") for further testing. Brooke also found that plaintiff was suffering from a "paranoid delusional state." Based upon the findings of Walter Reed and Brooke, the ABCMR recommended that the SG reconsider its prior no-disability decision. The SG complied and issued a new opinion stating that if plaintiff's current condition had existed at the time of his discharge he would have been referred to a Medical Evaluation Board ("MEB"), which would have determined plaintiff to be medically unfit and would have referred plaintiff to a Physical Evaluation Board ("PEB").

Plaintiff's application was then referred by the ABCMR to the United States Army Physical Disability Agency ("USAPDA"). The USAPDA determined that if plaintiff had been referred to a PED at the time of his discharge he would have been given a 10% disability rating with entitlement to disability severance pay. This determination was based on review of plaintiff's record including all of the evaluations

previously conducted and upon the fact that plaintiff was able to maintain employment for eight years after separation.

In July of 1981, the ABCMR provided plaintiff with copies of all of the relevant opinions noted above and invited plaintiff's response. Plaintiff requested a hearing at this time, but the ABCMR denied that request. Plaintiff then returned to the VA and asked them to review their rating decision of July 1980 granting plaintiff 10% disability. After another examination, the VA affirmed its prior decision. However, when requested to reconsider by the Disabled American Veterans organization, the VA convened yet another review by a "Board of Three Psychiatrists." When the Board confirmed the prior diagnoses, the VA granted plaintiff a 50% disability rating for service-connected schizophrenia. Plaintiff's counsel then submitted the VA decision to the ABCMR.

Ultimately, the ABCMR granted plaintiff's application in part, amending his records to state that he was honorably discharged with 10% disability entitling him to severance pay. His records were so amended and on May 17, 1982, plaintiff received $8,870.40 in disability severance pay based on the correction of his records.

. . . .

The ABCMR's Decision was Reasonable
and Supported By Substantial
Evidence.

The Court's role in cases of this type is limited to reviewing the record to determine whether the ABCMR's decision was arbitrary or capricious, unsupported by substantial evidence, or contrary to law.

See, e.g., deCicco v. United States, 677 F.2d 66, 70 (Ct. Cl. 1982); Heisig v. Secretary of the Army, 554 F. Supp. 623, 627 (D.D.C. 1982); Amato v. Chafee, 337 F. Supp. 1214, 1217 (D.D.C. 1972). The ABCMR's action clearly meets this standard in the case at bar.

It is undisputed that plaintiff is now suffering from a serious illness. However, that is not the question here. The ABCMR was charged with determining whether plaintiff was suffering from a disabling illness at the time of his discharge and whether that disability was caused by his ingestion of LSD in an Army experiment.

In order to arrive at a reasoned and supportable conclusion, the ABCMR authorized numerous physical and psychological examinations of plaintiff. Based on the evidence produced by these exams, and the recommendation of the USAPDA, the Board determined that plaintiff would only have been diagnosed as suffering from a 10% service related disability at the time of his discharge. The severity of his current illness, the Board concluded, was not causally related to the LSD he received in the Army's testing program. The Court finds that this determination was reasonable and supported by substantial evidence.

An Order in accordance with the foregoing will be issued of even date herewith.
